No. 92-74

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DEPARTMENT OF REVENUE OF THE STATE OF OREGON, and RICHARD A. MUNN, in his capacity as Director of the Department of Revenue of the State of Oregon,

Petitioner,

v.

ACF INDUSTRIES INCORPORATED, GENERAL AMERICAN TRANSPORTATION CORPORATION, GENERAL ELECTRIC RAILCAR SERVICES CORPORATION, PULLMAN LEASING COMPANY, RAILBOX COMPANY, RAILGON COMPANY, TRAILER TRAIN COMPANY, and UNION TANK CAR COMPANY,

Respondents.

On Petition For A Writ of Certiorari To the United States Court of Appeals For The Ninth Circuit

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RESPONDENTS' SUPPLEMENTAL BRIEF IN RESPONSE TO SOLICITOR GENERAL'S BRIEF

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QUESTION PRESENTED

Respondents re-state the Question Presented as follows:

Was the Court of Appeals wrong in holding, as have all other Courts of Appeal to have considered the question, that the imposition of a property tax on railroad personal property violates Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. §11503(b)(4), when significant amounts of other commercial and industrial tangible personal property are not taxed due to statutory exemptions?

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RESPONSE TO SOLICITOR GENERAL'S BRIEF

The Solicitor General's brief presents no compelling argument that "special and important reasons" exist to grant certiorari in this case under Supreme Court Rule 10. None of the specific enumerated grounds listed in Rule 10 are urged to be present here. The Solicitor General cites no true conflict in the decisions of the circuit courts, but he nevertheless urges that certiorari be granted based on his perception that review is warranted to resolve "conflicting rules that the courts have employed in determining liability for, and relief from, discriminatory state taxation. . ." *See* Brief, p. 9. The Solicitor General's review of the federal case law, however, does not support his conclusions. There is no discord among the circuits in holdings, results, or analyses in similar cases. The lack of complete accord which the Solicitor General perceives is based entirely on a few isolated portions of opinions dealing with a variety of cases, and is simply illusory.

All of the federal appellate cases which have addressed the exemption discrimination issue presented here, including the case below, involve substantial exemptions of other commercial and industrial tangible personal property. *See, e.g., Ogilvie v. State Board of Equalization*, 657 F.2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981) (total exemption of tangible personal property); *Trailer Train Company v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), *cert. denied sub nom. Boehm v. Trailer Train Company*, 490 U.S. 1066 (1989) (75% of tangible personal property exempt); *Burlington Northern Railroad Co. v. Bair*, 766 F.2d 1222 (8th Cir. 1985) (over 50% of tangible personal property not subject to tax); *Department of Revenue*,

State of Florida v. Trailer Train Company, 830 F.2d 1567 (11th Cir. 1987) (business inventories, including agricultural livestock, totally exempt).[1] The court below explicitly followed these cases, and its ruling is consistent with the results in these cases.

The court below correctly concluded, based on stipulated facts, that over 67% of the value of commercial and industrial tangible personal property in the State of Oregon was exempt. *See* Ninth Circuit's Table at App.-18.[2] Although some of the Ninth Circuit's language may be broader than earlier cases, the facts of this case place it squarely within the holding of the Eighth Circuit in *Leuenberger*, a decision which the Solicitor General appears to embrace as correctly decided. The Solicitor General, however, states that the case below differs from "[p]rior decisions addressing the discriminatory effect of property tax exemptions [which] have involved situations in which an unquestionably large portion of the comparable, nonrailroad property in the State was exempt." *See* Brief, pp. 13-14. The Solicitor General fails to explain why he feels the exemption of 67% of the total value of all commercial and industrial tangible personal property here is materially different from the exemption of 75% of such property in *Leuenberger*.

[1] *Department of Revenue v. Trailer Train* was an interlocutory appeal and not a review of factual findings by the district court. The extent of the exemptions of personal property is not revealed in that decision, although the court did note the allegation that the exemption of business inventories resulted in "a significant portion" of the tangible personal property of other commercial and industrial taxpayers being totally exempt from *ad valorem* taxation. *See* 830 F.2d at 1569-70.

[2] The value of exempt personal property is $9.7 billion. The value of taxed personal property is $4.8 billion dollars. Thus, the total value of both exempt and taxed personal property is $14.5 billion, of which $9.7 billion (or 67%) is exempt.

The Solicitor General is simply incorrect when he states that analyses in the case precedent dealing with exemption discrimination under 49 U.S.C. §11503(b)(4)[3] are "inconsistent." All the circuits that have addressed the exemption issue have determined that discrimination results from the continued taxation of railroad personal property when substantial amounts[4] of other commercial and industrial personal property are exempt. The circuits themselves neither perceive nor cite any conflict. The Solicitor General has been as unsuccessful as the petitioners and *amici* in citing to this Court evidence that any circuit court requires guidance because of differing analyses employed among the circuit courts in the precise kind of case presented here.[5] Indeed, there is no ruling by

[3] As the Solicitor General's brief points out at note 2, the statute involved here, Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 24-210, 90 Stat. 31, 54 (Feb. 5, 1976), is presently codified at 49 U.S.C. §11503. As did the Solicitor General, this brief will cite the subsections of Section 306 in their codified version.

[4] The Solicitor General understates the situation in Oregon when he repeats throughout his brief that Oregon exempts merely "various types" of commercial and industrial property. Oregon exempts all business inventories and all agricultural personalty, which results in the exemption of 67% of all commercial and industrial tangible personal property.

[5] Seeing inconsistency where none exists, the Solicitor General incorrectly states that the "reasoning" of the Eleventh Circuit has been "specifically rejected" by the Eighth Circuit in *Trailer Train Company v. State Tax Commission*, 929 F.2d 1300 (8th Cir.), *cert. denied*, 112 S.Ct 169 (1991). *See* Brief, p. 12. In fact, the Eighth Circuit does not cite any Eleventh Circuit precedent

any court to support the Solicitor General's bare assertion that "a tax scheme that would be proscribed in one circuit may be sustained in another." *See* Brief, p. 9. Such conflict has yet to develop because all of the statutory schemes tested to date have involved the same substantial exemption of other commercial and industrial tangible personal property which is present in Oregon, and the circuit courts have consistently found discrimination in such circumstances.

In urging that conflicting analyses exist on both the determination of the existence of discrimination and the remedy for discrimination, the Solicitor General heavily relies on language in cases which do not address claims of exemption discrimination such as presented here.[6] Moreover, he does not rely on the actual holdings of those cases—all of which remedied a discriminatory tax. Instead he seizes upon isolated passages and discussions from the opinions in those cases to conclude that conflicting analyses have been applied. To intimate that these cases create conflict with *Ogilvie, Leuenberger, Bair, Department of Revenue v. Trailer Train,* and the court below in any true sense is simply incorrect.[7] The circuits themselves do not cite any other circuits as being in conflict with their decisions concerning exemption discrimination.

in that decision, much less "specifically reject" it. *Trailer Train v. State Tax Commission* did not address exemption discrimination.

[6] *See, e.g., Clinchfield Railroad Company v. Lynch,* 700 F.2d 126 (4th Cir. 1983); *Kansas City Southern Railway Company v. McNamara,* 817 F.2d 368 (5th Cir. 1987); *Burlington Northern Railroad Company v. City of Superior,* 932 F.2d 1185 (7th Cir. 1991); *Trailer Train v. State Tax Commission, supra.*

[7] *Clinchfield* was an assessment ratio case decided under Subsection (b)(1). *Trailer Train v. State Tax Commissioner, McNamara,* and *City of Superior* relied on Subsection (b)(4), but

The Solicitor General cites the decision of the Eleventh Circuit in *Department of Revenue v. Trailer Train Company* as a major example of the alleged "conflicting analyses." He suggests that the Eleventh Circuit has required that the entire tax structure of a state be examined in determining whether exemption discrimination exists, and that the trial court should inquire whether there is any "reasonable distinction" for different tax burdens on different types of property. Although such a discussion does appear in that case, it does not reflect the holding in the case. The Eleventh Circuit merely affirmed the district court's granting of partial summary judgment which held that, in determining whether discrimination exists under Subsection (b)(4), exemptions must be considered. In its remand instructions, the court directed the district court to *consider* whether it would be appropriate to examine the entire tax structure. The Eleventh Circuit never held that such a comparison was appropriate or necessary, and no court, either district or circuit, has ever held that it is necessary to analyze the state's entire tax structure in determining whether tax differences are "reasonable" and thus non-discriminatory under Subsection (b)(4).[8]

those cases did not involve exemption discrimination, and in fact addressed non-property taxes.

[8] In *Alabama Great Southern Railway Company v. Eagerton,* 663 F.2d 1036 (11th Cir. 1981), the Eleventh Circuit in a remand order had suggested that the district court might find it necessary to review the entire tax structure of the state. In fact, the district court did not do so on remand, finding that it would

Reliance on such dicta shows that the supposedly conflicting analyses seen by the Solicitor General consist of nothing more than differences in the expression of rationales for results in different kinds of cases arising from a wide variety of situations. In urging such "inconsistency" as grounds for certiorari, the Solicitor General sets before this Court the daunting task of not only maintaining consistency of outcome among the circuit courts, but also of complete consistency of analysis, and perhaps even complete consistency of mere expression in differing cases.

The Solicitor General's view would have this Court accept review of this case in order to summarily synthesize a single, all-encompassing "test" for discrimination under Subsection (b)(4). However, he seeks this "guidance" before the decisions of the appellate courts demonstrate, by inconsistency of results, the need for any such guidance. In effect, the Solicitor General seeks an "advisory" opinion from this Court, which is unnecessary in view of the unanimity of opinion by the federal appellate courts concerning both the kind of exemption discrimination presented here, as well as other kinds of discrimination cases.

This Court should instead allow the circuit courts to decide discrimination cases based on the specific facts in each case as they arise. If in fact the Solicitor General is correct, and the courts are applying dif-

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be inappropriate to use the entire tax structure to determine the issue of discrimination. *See Alabama Great Southern Railway Company v. Eagerton*, 541 F.Supp. 1084 (M.D. Ala. 1982). In *Department of Revenue v. Trailer Train*, the Eleventh Circuit did not express any disagreement with the district court's finding on remand in *Eagerton* that a comparison of railroad taxes to the entire tax structure was inappropriate.

ferent standards, such inconsistency will result soon enough in specific conflicts. In fact, there are at least two cases pending in the circuits dealing with exemption discrimination.[9] At a future time, it might be proper for this Court to review one of those decisions to resolve any conflict, should one arise.

It would be particularly inappropriate for this Court to grant certiorari concerning the question of remedy, which the Solicitor General's brief admits is "fact-specific." *See* Brief, p. 9. To date, the remedies imposed by the appellate courts have been consistent. Where the discrimination has resulted from the fact that most or all other commercial and industrial personal property is exempt, the courts have correctly held that the plaintiffs should not pay tax on their rail transportation personal property. It should be remembered that such rulings do not preclude the imposition of non-discriminatory taxes on rail transportation. As the Fifth Circuit observed in *McNamara*:

> If state authorities approach the problem carefully, we trust that they can create tax structures that comply with the 4-R Act while ensuring that railroads pay their fair share of state taxes. We will not do that job for them.

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[9] In *Burlington Northern Railroad Company v. Dept. of Revenue of the State of Washington*, Nos. 92-36774 and 92-36875, the Washington Department of Revenue is arguing to the Ninth Circuit that the case presently under consideration by this Court was wrongly decided and should be re-considered. In *CSX Transportation, Inc. v. Tennessee State Board of Equalization*, No. 92-6100, the Sixth Circuit will for the first time rule on exemption discrimination.

See 817 F.2d at 378.

The Solicitor General suggests that the Eighth Circuit's decision in *Leuenberger* was inconsistent with its earlier decision in *Bair*. This suggestion is incorrect and is based on an erroneous reading of *Bair*. In both cases, the Eighth Circuit afforded to the plaintiffs the same tax treatment which most other commercial and industrial taxpayers received. In *Bair*, that treatment was the ability to claim valuation reductions and tax credits, as could most other commercial and industrial taxpayers in Iowa. In *Leuenberger*, that treatment was complete exemption because most other commercial and industrial taxpayers in Nebraska received a complete exemption. *Bair* was thus distinguished in the Eighth Circuit's later decision in *Leuenberger*,[10] and the remedy approved by the Eighth Circuit in *Bair* has not created conflict within the Eighth Circuit or any other circuit.

Finally, the Solicitor General cites the prediction of the *amici* that dire financial losses may result to the states because of the lower court's decision. These predictions are both exaggerated and irrelevant, and these losses have yet to materialize.[11] In any event,

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[10] The court in *Leuenberger* was thoroughly aware of its own prior holding in *Bair*. Indeed, Judge William C. Stuart, the district judge whose remedy was affirmed in *Bair*, also wrote the Eighth Circuit's decision in *Leuenberger*.

[11] The Solicitor General is careful to rely not on his own research, but rather on the *amicus* brief of the MultiState Tax Commission concerning estimates of loss to the states because of a proscription of exemption discrimination. *See* Brief, p. 16. The rhetoric of the MultiState's brief reveals a general hostility toward congressional exercise of power under the Commerce Clause to restrain discriminatory taxation of instrumentalities of

the provisions of 49 U.S.C. §11503 were enacted in 1976 and Congress gave the states three years to bring their statutes and practices concerning the taxation of railroad property into compliance with federal law before the statute became effective. Since 1979, another fourteen years have elapsed and numerous cases have been decided in favor of the railroads. No genuine fiscal hardship to the states has been shown. The case below represents no departure from the case precedent and is true to the purpose of Congress to prohibit discrimination.

CONCLUSION

The Courts of Appeal, the respondents, and the Solicitor General all agree that exemption discrimination should and can be remedied under 49 U.S.C. §11503(b)(4). There is no reason for this Court to examine that result unless and until compelling cases of conflict develop.

Respectfully submitted,

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interstate commerce. In any event, of the twenty-two states listed in Appendix B of the MultiState's amended brief, no more than two have been sued in a new case under Subsection (b)(4) for exemption discrimination in the year since the decision below issued.